UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES E. HOOVER, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER AT0351850491-X-1[1] DATE: JUN 3 1993

Suzanne Logue Lawrence, Esquire, Washington, D.C., for the appellant.

Gail R. Heriot, Esquire, Charleston, South Carolina, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a petition for enforcement of an initial decision that became the final decision of the Board. *Hoover v. Department of the Navy*, MSPB Initial Decision No. AT03518510491 (Aug. 2, 1985). In that initial decision, the Board reversed the reduction-in-force (RIF) action and ordered the Department of the Navy (agency) to cancel the appellant's placement in a position at a lower grade. The appellant then filed a petition for

[1] The correct docket number is AT0351850491-X-1. The docket number below was AT0351850491-M-1.

enforcement which was dismissed by the administrative judge on the basis of laches. *Hoover v. Department of the Navy*, MSPB Initial Compliance Decision No. AT035185C0491 (Sep. 4, 1990). The appellant filed a petition for review of the dismissal that was denied by the Board. *Hoover v. Department of the Navy*, 47 M.S.P.R. 122 (1991) (Table). The United States Court of Appeals for the Federal Circuit reversed the Board's dismissal of the petition for enforcement and remanded the case for consideration of the merits of the enforcement petition. *Hoover v. Department of the Navy*, 957 F.2d 861, 864 (Fed. Cir. 1992). The case was remanded to the Atlanta Regional Office for proceedings in accordance with the court's decision. *Hoover v. Department of the Navy*, 53 M.S.P.R. 424 (1992). After receipt of evidence and argument from the parties, an administrative judge issued a Recommendation finding the agency in noncompliance. For the reasons set forth below, the Board ADOPTS the Recommendation, as MODIFIED by the Opinion and Order, FINDS the agency in noncompliance, and ORDERS the agency to comply with the final decision of the Board.

BACKGROUND

The appellant held the position of Supervisory Computer Specialist, GS-12, with the Naval Weapons Station. In this position he served concurrently as Head of the Data Processing Department and as Head of the Systems Design and Programming Division, which was one of the two divisions

within the Data Processing Department. A consultant issued a report in May 1984, recommending that in lieu of the one position held by the appellant, two positions should be created, that of Department Head at a grade GM-13 and that of Division Head at a grade GS-12.

In August 1984, the appellant was detailed out of his Supervisory Computer Specialist position into a Security Officer position. In September 1984, the new GM-13 Department Head position was announced. The appellant applied for the position but was not selected. In January 1985, the appellant was issued a RIF notice stating that his position of GS-12 Supervisory Computer Specialist was being abolished due to a reorganization. The appellant was offered and accepted the position of GS-11 Security Officer in the Station Resources and Planning Department. Effective March 31, 1985, the appellant was changed to the lower-graded position of GS-11 Security Officer, but he was assigned back to the Data Processing Department. In April 1985, the position of Head of the Systems Design and Programming Division was announced. The appellant applied for this position but was not selected.

On April 5, 1985, the appellant appealed the agency's RIF action to the Board's Atlanta Regional Office. The administrative judge found that instead of a legitimate RIF due to a reorganization, the RIF was personal to the appellant because it was an attempt to demote him for

perceived performance problems, including not being able to perform his two jobs concurrently. *Hoover v. Department of the Navy*, MSPB Initial Decision No. AT03518510491 (Aug. 2, 1985). He also found that the appellant's pre-RIF position was abolished in name only and had been reconstituted, virtually unchanged, into two separate positions, neither of which was given to the appellant. *Id.* The administrative judge ordered the agency to cancel the RIF. *Id.* He did not specify the position in which the appellant should be placed. In September 1985, the agency placed the appellant in a GS-12 position in the Data Processing Department with the title, "Head of Plans, Programs and ADP Security Division." The duties of this position were different from those of the position that he held prior to the RIF.

First, the appellant filed a request for review of the agency's compliance with the Office of Personnel Management. Next, he filed a complaint with the Office of Special Counsel. Finally, in May 1990, the appellant filed a petition for enforcement with the Board. He contended that the position to which he had been assigned after the Board's decision was substantially different from the position that he encumbered prior to the RIF, and that since his original position was continued in two separate positions after the RIF, he was entitled to be restored to one of these positions. The agency responded that the petition for

enforcement was untimely under Board regulations and that the petition should be barred on the ground of laches.

The administrative judge found that at the time of the 1985 decision, the regulations set no time limit for filing a petition for enforcement. *Hoover v. Department of the Navy*, MSPB Initial Compliance Decision No. AT03518510491 (Sep. 4, 1990). She found, however, that the appellant had delayed unreasonably in filing his petition. *Id.* The administrative judge agreed with the agency that it would be prejudiced if it was required to reconstruct management and personnel decisions that had been made over the years that preceded the petition, since a number of key persons had retired. *Id.* She concluded that the doctrine of laches applied and dismissed the petition for enforcement. *Id.* This became the final decision of the Board when the appellant's petition for review was denied. *See Hoover v. Department of the Navy*, 47 M.S.P.R. 122 (1991) (Table).

The United States Court of Appeals for the Federal Circuit reversed the Board's determination that the enforcement petition was barred by laches. It noted that laches requires both unreasonable delay by the petitioner and prejudice to the respondent because of the delay. It found that the agency had not shown "defense prejudice," namely, that it encountered difficulty in mounting its defense due to Mr. Hoover's delay in filing his petition for enforcement. Specifically, the court found that the agency

had not shown that relevant events since 1984 were difficult to reconstruct because of the extensive reorganization and growth of the agency's Data Processing Department. It found that an affidavit submitted by the agency in which a current employee, familiar with the organization of the agency, set forth the history of the various positions occupied by the appellant belied the agency's assertion that it was difficult to reconstruct the relevant events. The court further found that the agency had not shown that its retired witnesses were unavailable. *See Hoover v. Department of the Navy*, 957 F.2d at 863. Accordingly, the court reversed the Board's dismissal of the petition for enforcement and remanded the appeal for consideration of the enforcement petition "on its substantive merits." *Id.* at 864.

In his petition for enforcement after remand, the appellant contended that he should have been placed in either the GM-13, Department Head position or the GS-12, Division Head position when the RIF was reversed. The agency contended that it was in full compliance with the Board's final decision by cancelling the RIF and renewed its contention that the enforcement petition was barred by laches. The administrative judge held, *inter alia*, that, she would not entertain the laches issue because it had been resolved by the Federal Circuit. She found further that because the new Department Head position had supervisory duties over the new Division Head position, return to the

status quo ante did not require that the appellant be placed in the Department Head position. She held that the appellant was entitled to placement in the position of Division Head because that position had no grade controlling duties that the appellant had not previously performed. Accordingly, the administrative judge issued a Recommendation that the agency be found in noncompliance.

The agency has filed a brief in support of its continued noncompliance with the final decision of the Board. The appellant has filed a submission containing a response to the agency's brief and a petition in opposition to findings made in the Recommendation. The agency has filed a response to the appellant's petition.[2]

ANALYSIS AND FINDINGS

The administrative judge correctly refused to reconsider the agency's argument that laches bars the appellant's petition for enforcement.

The agency continues to argue that the appellant's petition for enforcement is barred by laches; however, it now presents a new theory of laches, specifically, that if the Recommendation is adopted by the Board, the agency would experience economic prejudice because the appellant would

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[2] The agency has included in its response additional argument in opposition to the Recommendation. Because the agency was already afforded an opportunity to file its opposition, see 5 C.F.R. § 1201.183(a)(6), this additional argument will not be considered.

receive a "windfall" if he received back pay to the effective date of the RIF, March 31, 1985.

We find that the administrative judge correctly refused to reconsider the agency's defense of laches in adjudicating the enforcement petition. We note that the agency did not raise its theory of economic prejudice below but, rather, has first raised it in its current brief to the Board objecting to the administrative judge's Recommendation. Previously, as noted above, the agency had claimed only defense prejudice in its response to the appellant's May 1990 enforcement petition. *See* Compliance Appeal File, MSPB Initial Compliance Decision No. AT035185C0491, Tab 8 at 1. Moreover, in its brief on appeal to the Court of Appeals for the Federal Circuit, the agency specifically declined to argue economic prejudice stating:

> In contrast to *Cornetta*, [*Cornetta v. United States*, 851 F. 2d 1372 (Fed. Cir. 1988)][*en banc*] wherein the Court primarily applies the concept of 'economic prejudice' to the facts because of the back pay issue, in our case the more important concept is the concept of 'evidentiary prejudice,' the inability to mount a defense. Contrary to Hoover's suggestion, back pay was never presented as an issue to the MSPB in 1990 and should not be at issue in our case now.

See Compliance File, MSPB Initial Compliance Decision No. AT0351850491X1 (Jul. 15, 1992), Tab 4, Agency Brief at 16 n.4.

The agency continued to argue only defense prejudice in its responses in connection with the instant enforcement petition. *See* Compliance File, *id.* at Tabs 5 and 11. The

administrative judge considered the timeliness of the petition for enforcement to have been decided by the Court of Appeals for the Federal Circuit and declined to entertain that issue, noting that any further litigation on that point would require an appeal from the Federal Circuit's decision. *See id.*, Tab 9. There is no showing that the agency ever sought rehearing of the court's decision.

The Board has held that an agency cannot raise objections in its exceptions to the noncompliance recommendation, if those objections could have been, but were not, presented to the administrative judge. *See Jackson v. U.S. Postal Service*, 45 M.S.P.R. 560, 563 (1990). Here, the agency had two opportunities to raise this laches theory to an administrative judge, and it also could have argued economic prejudice before the Federal Circuit. As detailed above, the agency specifically chose not to do so, stating to the Federal Circuit that the matter of back pay "should not be at issue in our case now."

Further, the Board's reconsideration of the laches issue is barred by the application of the law of the case doctrine, specifically by the "mandate rule." Briefly stated, that rule means that an inferior tribunal is bound to honor the decisions of superior tribunals within a single judicial system. *See generally* 1B MOORE'S FEDERAL PRACTICE (1993 Supp.) § 0.404(10); 18 C. Wright, A. Miller & E. Cooper FEDERAL PRACTICE AND PROCEDURE: Law of the Case

§ 4478 (1981). As one court has cogently put it: "The 'mandate rule,' as it is known, is nothing more than a specific application of the 'law of the case' doctrine." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), *cert. denied sub num, Hoffman v. Sylva*, 476 U.S. 1169 (1986). The Board is bound by the mandates of the Court of Appeals for the Federal Circuit because that is the judicial review authority for Board decisions, except those Board decisions involving discrimination issues. *See* 5 U.S.C. § 7703(b)(1)-(2). Decisions of the Federal Circuit are controlling authority on the Board. *Fairall v. Veterans Administration*, 33 M.S.P.R. 33 (1987), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

More broadly, the law of the case doctrine refers to the practice of courts in refusing to reopen what has been decided and of following a prior decision in an appeal of the same case. The doctrine applies not only to matters which were explicitly decided in a prior decision, but also to matters decided by necessary implication. *See Smith International Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1577 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 827 (1985). *See also State Industries, Inc. v. Mor-Flo Industries, Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991). Consistency derived from application of the law of the case doctrine avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action

by minimizing the possibility of inconsistent decisions." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991), *quoting Montana v. United States*, 440 U.S. 147, 153-54 (1979). The law of the case doctrine has been applied to administrative agency proceedings. *See id.*[3]

There are three recognized exceptions to application of the law of the case doctrine: the availability of new and substantially different evidence, a contrary decision of law by controlling authority which is applicable to the question at issue, or a showing that the prior decision was clearly erroneous and would work a manifest injustice. *See Smith International*, 759 F.2d at 1576. *See also Piambino*, 757 F. 2d at 1120. There are no exceptional circumstances here which would warrant our departure from the law of the case doctrine and our consequent failure to follow the Federal Circuit's mandate to consider the merits of the petition for enforcement.

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[3] Contrast the law of the case doctrine with res judicata which is not applicable here. The law of the case doctrine "is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages." *See* 1B MOORE'S FEDERAL PRACTICE (1993 Supp.) § 0.401. "As applied to appellate court decisions, it serves the dual function of enforcing the mandate and precluding multiple appeals to review the same error." *Id.* "*[R]es judicata or claims preclusion*, ... deals with the effect of a judgment on the underlying claim or cause of action" ... "Res judicata precludes relitigation of the claims as to either issues of law or fact, if such issues could have been raised and determined." *Id.* Thus, res judicata does not apply here because the agency has not brought a second action to raise economic prejudice, but rather, has raised it in the very same action involved in the Federal Circuit's decision.

We have already noted the lack of new evidence relating to the laches issue. Further, there has been no contrary decision of law regarding laches. Nor is there a showing that the Federal Circuit's decision on laches is clearly erroneous or would work a manifest injustice. In practice, although courts often refer to the manifest injustice exception, that exception is rarely invoked. 18 Wright, Miller & Cooper, *id.*, § 4478. Courts have consistently held that disregarding the law of the case under the manifest injustice standard requires "exceptional circumstances." *See e.g., Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83 (D.C. Cir. 1984). The Federal Circuit has described the standard for invoking the manifest injustice exception as a stringent one which "'requires a strong showing of clear error' that 'convinces' the court that the 'prior decision was incorrect.'" *Smith International*, 759 F.2d at 1579, *quoting Northern Helex Co. v. United States*, 634 F.2d 557, 562 (Ct. Cl. 1980).

Even if we entertained the agency's argument that it would suffer economic prejudice as a result of the back pay award to the appellant, such argument is not sufficiently persuasive to show error or manifest injustice in declining to bar the enforcement petition by laches. The Federal Circuit considered whether entitlement to back pay shows economic prejudice in the laches context in a case involving an alleged wrongful discharge of a military officer and

rejected that argument on a number of grounds, noting, *inter alia*, that "if back pay constitutes prejudice then virtually every suit could be said to be presumptively 'prejudicial' because most successful military claimants receive back pay." *See Cornetta v. United States*, 851 F.2d at 1381. As in *Cornetta*, in the civilian context, the sovereign has consented to be sued and to award back pay, 5 U.S.C. § 5596; claimants must be reimbursed for damages they have sustained. Although there is no definitive precedent specifically finding no economic prejudice in awarding civilian employees back pay, there is no reason to conclude that the result would not be similar to that in *Cornetta* if the matter were litigated. In any event, in accordance with the mandate rule, we follow the Federal Circuit's remand order to decide the instant petition on its merits, and we decline to consider the agency's new theory of laches.[4]

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[4] It has been held, without specific mention of the law of case doctrine, that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand. *See Northwestern Indiana Telephone Co., Inc. v. Federal Communications Commission*, 872 F.2d 465, 470 (D.C. Cir. 1989), *citing Laffey v. Northwest Airlines*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984). According to the court, "This widely-accepted rule furthers the important value of procedural efficiency, 18 C. Wright and A. Miller, FEDERAL PRACTICE & PROCEDURE § 4478 (1981), and prevents the 'bizarre result' that 'a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who argued and lost,'" *citing Laffey v. Northwest Airlines*, 740 F.2d at 1089-90, *quoting Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982). Similarly, we find that it would be inappropriate to consider the agency's new argument regarding laches here when it has already lost on that matter. The agency could have, and should have raised its

The agency is required to return the appellant to the status quo ante.

The initial decision, which became the final decision of the Board, reversed the RIF, and ordered the agency to cancel the action and to award the appellant any applicable back pay and benefits. The agency has cancelled the reduction-in-force action. The agency's obligation, however, extends further. When it corrects a wrongful personnel action, the Board must ensure that the employee is returned, as nearly as possible to the status quo ante. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). The Federal Circuit in *Kerr* referred to *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19, 95 S.Ct 2362, 2372 (1975), where the Supreme Court stated that legal remedies should place the injured party as nearly as possible in the situation that he or she would have occupied if the wrong had not been committed. *Kerr*, 726 F.2d at 733 n.3. Restoration to the status quo ante requires that the appellant be placed in the position from which he was removed or in a position substantially equivalent in scope and status to his former position. *See Taylor v. Department of the Treasury*, 43 M.S.P.R. 221, 224 (1990). Further, the Board looks carefully at reassignments to determine whether the agency has returned an appellant as nearly as possible

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theory of economic prejudice in the first court proceeding; rather, it chose to argue only defense prejudice. In effect, the agency has waived its right to advance its new legal theory.

to the status quo ante. *Cofield v. Government Printing Office*, 22 M.S.P.R. 392 (1984).

Placing the appellant in the position of Head of the Plans, Programs and ADP Security did not return him to the status quo ante.

In *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274-75 (1985), the Board set out the analysis to be used in determining whether an agency has complied with a Board order to reinstate an employee. After it is determined that the employee has not been reinstated to his or her former position, several matters must be resolved. *Id.* at 274. First, it must be determined if the appellant's former position still exists. *Id.* at 274-75. Then, if the former position still exists, it must be determined whether there is a strong overriding interest requiring the appellant's reassignment to another position. *Id.*; *Williams v. Department of Health and Human Services*, 32 M.S.P.R. 259 (1987).

The improper reduction in force abolished the position in which the appellant concurrently served as Head of the Data Processing Department and Head of the Systems Design and Programming Division. The two positions that were created after the reduction in force equaled the appellant's pre-RIF position. Board Decision at 7. To return the appellant to the status quo ante, he must be placed in the position that he would have encumbered but for the agency's improper action. The agency did not place the appellant in

either of the positions that were created. Instead, the agency placed him in the Data Processing Department in the GS-12 position of Head of Plans, Programs and ADP Security Division.

The administrative judge found that while this position is that of a Supervisory Computer Specialist, the position is different from the job that the appellant held prior to the improper RIF. The agency contends that by placing the appellant in the position of Head of Plans, Programs and ADP Security Division, it has returned him as nearly as possible to the status quo ante. The agency has not refuted the administrative judge's finding that this position is different from the one that he held prior to the RIF. There is nothing in the record setting forth the duties of this position. Accordingly, no comparison can be made between this position and that from which the appellant was improperly removed. Therefore, the Board cannot determine whether the position of Head of Plans, Programs and ADP Security Division is substantially equivalent to the appellant's former position. The administrative judge correctly found, therefore, that the agency has not shown that placing the appellant in this position returns him as nearly as possible to the status quo ante.

<u>The appellant should be placed in either the position of Division Head or Department Head.</u>

<u>The position of Division Head.</u>

Before the improper RIF, the appellant was a GS-334-12 Supervisory Computer Specialist serving as both Division Head and Department Head. The position of Division Head, Supervisory Computer Programmer/Analyst, GS-334-12, that was created after the RIF had essentially the same responsibilities and involved supervision of the same employees. Board decision at 7.

In the Recommendation, the administrative judge found that the appellant should have been returned to the GS-12 position of Head of the Systems Design and Programming Division, effective March 31, 1985, the date of the RIF. In 1986, the Data Processing Department was merged with another department. In 1988, the position of GS-12, Head of Systems Design and Programming Division was upgraded to GM-13 and the title was changed to Head of the ADP Programming and Operations Division. Accordingly, the administrative judge found that, effective June 19, 1988, the appellant must be retroactively promoted to the GM-13, Division Head position.

The agency contends that it has compelling reasons for not placing the appellant in the position of Division Head. It argues that another employee, the present incumbent, of the position will be harmed. However, the fact that an agency has filled the position to which the appellant should have been restored does not establish a compelling reason for failing to reinstate the appellant. *Williams v. Department of Health and Human Services*, 32 M.S.P.R. 259,

262 (1987); *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 275 (1985).

The agency also argues that placing the appellant in the position of Division Head would cause undue interruption because there has been an accretion of duties to the position. The agency has not proffered the position descriptions for the post-RIF Division Head position or that of the current Division Head position to show the change of duties. It has offered without argument the vacancy announcements for the two positions. These announcements do not provide sufficient information to compare the duties and responsibilities of the former position with those of the latter position; therefore, no determination can be made of any accretion of duties. It has offered affidavits by the civilian personnel director and a supervisory labor relations specialist, but no duties were identified.

In support of its undue interruption argument, the agency cites *Grant v. Department of Transportation*, 833 F.2d 1023 (Fed. Cir. 1987) (Table), an unpublished decision. An unpublished decision of the Federal Circuit is not precedential. Therefore, the Board will not rely on such a decision. *Kotulak v. Department of Agriculture*, 35 M.S.P.R. 111, 113 (1987). The agency has presented no evidence to substantiate its assertion that returning the appellant to the position of Division Head would unduly interrupt the agency's work. Mere assertions in response to the petition

for enforcement are not evidence. *Vincent v. Department of Justice*, 32 M.S.P.R. 263, 268-69 (1987). The agency states that the best interest of the agency will not be served because of the advances that have been made in the automated information management field over the intervening years. The appellant has served in the position of Division Head and has been continually employed as a Supervisory Computer Specialist. Finally, it is expected that some disruption will occur when an incumbent in a position is changed. *Williams v. Department of Health and Human Services*, 32 M.S.P.R. at 262.

The agency argues that the appellant would be provided a windfall if he is retroactively promoted to the GM-13 level because had he held the Division Head position, he might not have been promoted. The agency stated that the incumbent's promotion was based on his personal knowledge, skill, and ability and that the appellant did not have the background and experience of the incumbent. The agency has the burden of showing that it was in compliance. *Dacey v. United States Postal Service*, 36 M.S.P.R. 198, 200 (1988). The agency has presented no evidence to support its assertion. Further, as the administrative judge stated in the Recommendation, the agency's reliance on what might have happened to the Division Head position had it properly complied with the Board's decision and placed the appellant in that position when it cancelled the RIF is not nearly as

persuasive as what actually happened to the position. The position was noncompetitively upgraded to the GM-13 level, and the agency must now accord the appellant the same treatment that it accorded the incumbent of the position from which the appellant was improperly removed and to which the appellant was improperly denied restoration.

The Department Head position.

The position of Department Head, Supervisory Computer Specialist, GM-334-13, that was created after the RIF had the same duties that the appellant performed when he encumbered the position of Department Head before the RIF. Board decision at 7. The positions were virtually unchanged. *Id.* In 1986, when the Data Processing Department was merged with another department, the GM-13 Department Head position was upgraded to a GM-14 position.

The agency contends that it was not required to place the appellant in the Department Head position for several reasons. The agency argues that the administrative judge who adjudicated the petition for appeal stated during the hearing that he did not have the authority to order the agency to assign the appellant to the GM-13, Department Head position in the event that the appellant prevailed in the appeal. *See* Hearing transcript, page 114, Compliance file II, tab 11, enclosure 3. However, the administrative judge also stated during the hearing that if the appellant performed as a Department Head prior to the RIF, the relief

would be to return him to the status quo ante. Hearing transcript, page 115, Compliance file II, tab 11, enclosure 3. The administrative judge continued that it would be up to the agency to determine if additional action was necessary because both of the positions from which the appellant was removed were abolished. *Id.*

The Board has far-reaching authority to ensure compliance with its decisions. *Kerr*, 726 F.2d at 730 *Higashi v. Department of the Army*, 26 M.S.P.R. 330, 331 (1985). The appellant performed the duties of the Department Head position at a GS-12. The upgraded Department Head position that resulted after the improper RIF had the same duties. While the former Department Head position existed, it was not at the same grade.

In deciding whether reinstating an employee to his or her former position at a different grade amounts to a restoration to the status quo ante, the Board will analyze the reasons why the position was reclassified in order to determine whether the employee would have remained in the position at the higher grade level if the unwarranted personnel action had not occurred. *Taylor v. Department of the Treasury*, 43 M.S.P.R. 221, 225 (1990). The Department Head position was upgraded to give that position supervisory authority over the Division Head. However, the pre-RIF Department Head position had supervisory authority over Division Heads. Initial Appeal file, volume I, tab 8;

volume II, tab O, pages 6-7. Because the duties of the pre-RIF and post-RIF Department Head positions did not change significantly, we find that the appellant would have remained in the position but for the improper RIF action. *See Taylor* at 225-26.

The agency offers as a rationale for denying the appellant reassignment to the Department Head position its subsequent reorganization of Data Processing Department by merging it with another department. The agency states that the Department Head position that was created after the RIF no longer exists. This reorganization does not constitute a compelling reason to override the appellant's entitlement to the position of Department Head.

Where as here an employee encumbered and was performing the duties of two positions, the agency conducted an improper reduction in force to remove the employee from both positions, and the two positions were virtually unchanged after the RIF, yet the employee was placed in neither, the agency should have returned the appellant to one of the two post-RIF positions. The agency has not shown compliance with the Board decision, and the agency has not shown a compelling reason for not reinstating the appellant to one of the two positions.

ORDER

The agency is ORDERED to retroactively place the appellant in either the position of GS-12, Head of Systems

Design and Programming Division or GM-13, Head of the Data Processing Department, effective March 31, 1985. If the agency is precluded from retroactively placing the appellant in the position chosen because the date that the position was advertised was after March 31, 1985, the agency may assign the appellant to his former GS-12 position for the intervening period. It must retroactively promote the appellant to the GM-13, Head of ADP Programming and Operations Division or GM-14, Head of the Management Engineering and Information Department, effective the date that the promotion was granted to the incumbent. The agency must also pay the appellant back pay resulting from the retroactive promotion with interest and benefits in accordance with Office of Personnel Management regulations.

Accordingly, we ORDER the agency to submit to the Clerk of the Board within 20 days of the date of this order satisfactory evidence of compliance with this decision. The agency must serve all parties with copies of its submission. 5 C.F.R. § 1201.61.

We also ORDER the agency to identify the individual who is responsible for ensuring compliance and file the individual's name, title and mailing address with the Clerk of the Board within five days of the date of service of this order. This information must be submitted even if the agency believes that it has fully complied with the Board's order. If the agency has not fully complied, it must show

cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) (Supp. III 1991)[5] and 5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

NOTICE TO THE APPELLANT

You may respond to the agency's evidence of compliance within 20 days of the date of service of that evidence. If you do not respond the Board will assume that you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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[5] Section 1204(a) provides that the Board may order a federal employee to comply with its orders and enforce compliance. Section 1204(e)(2)(A) provides that the Board may order that an employee "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." The procedure for implementing these provisions is set out at 5 C.F.R. § 1201.183.